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No. 93-1506

IN THE

Supreme Court of the United States

October Term, 1993

THOMAS L. MICKLER,
Petitioner,

vs.

THE NIMISHILLEN & TUSCARAWAS RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RULE 29.1 STATEMENT

Respondent, Nimishillen & Tuscarawas Railway Company, is a wholly-owned subsidiary of Republic Engineered Steel, Inc.

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STATEMENT OF THE CASE

This case involves a personal injury claim for damages by an employee of Nimishillen & Tuscarawas Railway Co. (N&T) against N&T, based on an allegation of negligence, pursuant to 45 U.S.C. §51 which provides for Federal Employers' Liability Act (FELA) claims against common carrier railroads.

Petitioner, Thomas L. Mickler (Mickler), urges this Court to expand the jurisdiction of United States district courts and allow actions by railroad employees against private, in-plant railroads under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51, *et seq.* FELA provides a cause of action only to employees of common carrier railroads, stating:

> "Every *common carrier* by railroad while engaging in commerce between any of the several States or Territories ... shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce..., for such injury or death resulting in whole or in part from the negligence of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, ... or other equipment." 45 U.S.C. §51. (emphasis added)

In *Wells Fargo & Co. v. Taylor,* 254 U.S. 175, 51 S. Ct. 93, 65 L. Ed. 205 (1920), the Court held that a common carrier railroad that is subject to FELA liability is one that carries "for the public ..." *Id.* at 187-88, 41 S. Ct. at 98. Under that rule, the Sixth Circuit Court of Appeals held that a private, in-plant railroad that carries only for a single business is not a common carrier railroad under 45 U.S.C. §51, of FELA. *Kieronski v. Wyandotte Terminal Rd. Co.,* 806 F.2d 107, 109 (6th Cir. 1986).

N&T moved for summary judgment, based on evidence that it was not a common carrier railroad, and, therefore, not subject to FELA. The evidence showed it was a wholly owned subsidiary of Republic Engineered Steel, Inc. (Republic), and that it transported goods only for Republic.

The trial court dismissed the case on summary judgment, holding that on the evidence properly before it reasonable minds could only conclude that N&T was a private, in-plant railroad, and was not subject to FELA liability. The Sixth Circuit Court of Appeals affirmed the judgment, holding there was no evidence that N&T was a common carrier railroad subject to FELA liability.

SUMMARY OF ARGUMENT

Mickler argues that the Court should eliminate the express limitation in 45 U.S.C. §51 that only common carrier railroads are subject to FELA. The three steps to his argument are simple:

> (1) Congress enacted the Federal Railroad Safety Improvement Act of 1988 (RSIA)[1], amending the earlier railroad safety acts[2] to apply to all railroads, whether or not they were common carriers;
>
> (2) FELA provides a private right of action to railroad employees injured in the course of employment, and the right is affected by the railroad safety acts; and
>
> (3) Congress, therefore, impliedly intended that FELA should apply to all railroads, whether or not they were common carrier railroads, when it enacted RSIA.

Mickler's argument fails for two reasons. First, district courts have only such jurisdiction as Congress confers expressly, and jurisdiction cannot be raised through implication from new legislation where Congress has left intact an existing express limitation on such jurisdiction. Second, the premise of the argument is wrong: RSIA does not show a Congressional intent that private, in-plant railroads be subject to federal railroad safety legislation. Congress allowed the Secretary of the Department of Transportation to decide whether in-plant railroads would come under RSIA, and the Secretary has applied the legislation only to common carrier railroads.

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[1] Pub. L. No. 100-342, 102 Stat. 624.

[2] The Locomotive Boiler Inspection Act (LBIA), 45 U.S.C. §§22-24; The Railroad Safety Appliance Act (RSAA), 45 U.S.C. §§1, *et seq.*; The Accident Reports Act, 45 U.S.C. §§38-43; The Signal Inspection Act, 49 U.S.C. App., §26, *et seq.*

REASONS FOR DENYING THE WRIT

The Petition, Which Seeks To Have The Court Expand The Federal Question Jurisdiction Of District Courts, Should Be Denied Because Congress Has Not Provided For Such An Expansion, Either By Express Statement Or By Implication.

A. The jurisdiction of United States District Courts arises only if the U.S. Constitution or Congress confers jurisdiction expressly, and cannot be otherwise inferred.

Mickler asks the Court to expand the federal question jurisdiction of district courts to include under FELA the work injury claims of employees of railroads that are not common carriers. He argues the Court should announce such a rule, based on what he perceives to be the implied intent of Congress that FELA jurisdiction should be so extended.

The jurisdiction of federal courts is limited, and arises only by express provision in the Constitution or by Congress. Any limitations Congress has provided on such jurisdiction must be upheld. As the Court held in *Owen Equipment & Erection Co. v. Kroger,* 437 U.S. 365, 374, 98 S. Ct. 2396, 2403, 57 L. Ed. 2d 274 (1978):

> "The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded."

In *Shamrock Oil & Gas Corp. v. Sheets,* 313 U.S. 105, 615 S. Ct. 868, 85 L. Ed. 1214 (1941), the Court held that statutory limitations on federal court jurisdiction are to be strictly construed.

Congress has conferred federal court jurisdiction over FELA claims, but only to the extent that those claims are allowed by statute. Congress left in place the

common carrier limitation to FELA liability in 45 U.S.C. §51. The plain language of the statutory limitation must be upheld. If Congress intended all railroads to be subject to FELA, whether or not they were common carriers, it would have amended the FELA statute to show that intent.

B. Congress did not intend that private in-plant railroads would be subject to liability under the Federal Employers' Liability Act. 45 U.S.C. §§51, *et seq.*, by enacting the Federal Railroad Safety Improvement Act of 1988 (RSIA).

The premise of Mickler's argument is that Congress intended private, in-plant railroads to be subject to the federal railroad safety acts when it enacted RSIA. The railroad safety acts, however, do not affect in-plant railroads.

While the railroad safety acts confer on the Secretary of the Department of Transportation authority to enforce the acts[3], the Secretary has delegated that authority to the Federal Railroad Administration (FRA). While the FRA has statutory jurisdiction over all railroads under RSIA (*see, e.g.*, 45 U.S.C. §16, as amended), FRA does not exercise jurisdiction to the full extent permitted by statute. As explained in 49 C.F.R. Part 209, App. A:

> "Based on its knowledge of where the safety problems were occurring at the time of its regulatory action and its assessment of the practical limitations on its role, FRA has, in each regulatory context, decided that the best option was to regulate something less than the total universe of railroads."

[3] *See, e.g.* 45 U.S.C. §15, giving the Secretary the duty to enforce the Safety Appliance Act.

FRA has excluded in-plant railroads from regulation under the safety acts. For example, the C.F.R. part relating to Railroad Safety Appliance Standards provides:

> 49 C.F.R. §231.0(b)
>
> "This part does not apply to:
> (1) A railroad that operates only on track inside an installation which is not part of the general railroad system of transportation."[4]

Mickler argues that the Court should extend FELA liability to match the reach of the railroad safety acts (Petition, p. 15). However, since in-plant railroads are exempt from the federal regulation, Mickler's argument is baseless.

Further, the legislative history to RSIA explains the intent of Congress that the act would not affect FELA. The Senate Report explains that while RSIA authorizes the FRA to take direct enforcement actions against railroads, "[i]t would not otherwise affect private proceedings as between railroads and their employees." Sen. Rep. No. 100-153 §3, cited in 1988 U.S.C.C.A.N. at 701. Congress did not intend RSIA to alter the scope of liability under FELA.

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[4] *See, also,* 49 C.F.R. §215.3 (Railroad Freight Car Safety Standards); 49 C.F.R. §218.3(b)(1) (Railroad Operating Practices); 49 C.F.R. §229.3 (Railroad Locomotive Safety Standards).

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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